

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JOSE MORENO

Claimant

VS.

L. WALTY ROOFING & GUTTERING, INC.)

Respondent

AND

KBIWCF

Insurance Carrier

Docket No. **1,048,032**

ORDER

Claimant requested review of the August 13, 2010 Award by Special Administrative Law Judge Seth Valerius. The Board heard oral argument on November 3, 2010. Seth Valerius, the Division's Acting Director appointed E.L. "Lee" Kinch of Wichita, Kansas, to serve as Board Member Pro Tem in place of Carol Foreman, who retired in September 2010.

APPEARANCES

Scott J. Mann of Hutchinson, Kansas, appeared for the claimant. Roy T. Artman of Topeka, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Special Administrative Law Judge (SALJ) found claimant failed to sustain his burden of proof that his accidental injury arose out of and in the course of employment.

Claimant requests review of the following: (1) whether claimant's accidental injury arose out of and in the course of employment; (2) whether the relationship of

employer/employee existed on the date of the accident; (3) whether claimant is entitled to temporary total disability compensation; and, (4) nature and extent of claimant's disability.

Respondent raises the following issues on review: (1) whether claimant met with personal injury by accident on September 3, 2009, while working for Alvarez Roofing, LLC.; (2) average weekly wage; (3) whether claimant is entitled to temporary total disability compensation and medical treatment; and, (4) nature and extent of claimant's disability, if any.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Larry Walty Roofing & Guttering, Inc. (Larry Walty Roofing), a general contractor, hired a subcontractor, Alvarez Roofing, LLC. (Alvarez Roofing), to perform work in Sedgwick County, Kansas. At the preliminary hearing, it was stipulated Larry Walty Roofing was the statutory employer as Alvarez Roofing did not have worker's compensation insurance.

Claimant testified he was employed by Alvarez Roofing, LLC. for approximately 2.5 months. He further testified he was paid in cash at \$100 per day and worked six or seven days a week. Some days he worked 13 or 14 hours. No taxes were taken out of his pay.

On September 3, 2009, claimant testified that he was on the roof and needed to go to ground level to get a piece of sheet metal when he fell approximately 12-14 feet off the ladder and hit the ground with his forehead. There were a total of six people working for Alvarez Roofing when the accident occurred. A co-worker took claimant to Via Christi St. Francis hospital's emergency room where claimant was admitted for observation and then released the next day. Claimant was advised to report back to the physician's clinic in two weeks. Claimant has not worked since the accident. He had a follow-up visit within two weeks. The doctor recommended that he find a physician of his own so claimant's attorney sent him to Dr. Paul Stein. Dr. Stein placed temporary restrictions on claimant of no lifting greater than 40 pounds, no working at heights and no repetitive overhead activity or repetitive bending and twisting of the neck.

After a preliminary hearing, the ALJ found that claimant was injured out of and in the course of employment with Alvarez Roofing, a subcontractor of Larry Walty Roofing, on September 3, 2009. Dr. Stein was authorized as claimant's treating physician and the general contractor was ordered to pay temporary total disability benefits and medical treatment.

At the regular hearing on this claim additional witnesses, who had not testified at the preliminary hearing, testified regarding the incident that occurred on September 3, 2009. And the version of events differed from claimant's preliminary hearing testimony in particular regarding the fact that claimant was not an employee on the date of the incident.

Elvin "Giovanni" Alvarez, testified that Alvarez Roofing was his company and that he was in the roofing business from August 2009 through November 2009 but had not performed any work after the latter date due to the weather. He stated that he paid his employees \$100 a day in cash and they had to sign a receipt when paid. Mr. Alvarez testified that neither claimant nor Mr. Blanco ever worked for him. He further testified that Mr. Blanco worked for Jesus Rivera. And he testified that Jesus Rivera did not start working for Alvarez Roofing until October 2009. He further testified that on the date of the accident neither claimant nor Mr. Rivera worked for him but they had come to the job site looking for work.

Jesus Rivera testified that claimant was his roommate and on September 3, 2009, they drove, with Mr. Blanco, to Wichita to see if Mr. Alvarez would hire them. For a few months before August 2009, claimant and Mr. Blanco had worked for Mr. Rivera. Mr. Rivera testified:

Q. Now, in September 2009, is that when you came to Wichita looking for work?

A. Yes. I came here to Wichita to look for work.

Q. And Mr. Moreno and Mr. Blanco came with you?

A. Yes.

Q. Where did you go to look for work?

A. We went over to, well, I don't remember the exact address.

Q. Was it an Alvarez Roofing job site?

A. Yes.

Q. And you were looking for Mr. Alvarez or who?

A. Yes, we were looking for Mr. Alvarez.

Q. For the purpose of wanting to meet with him was to see if he had any jobs for you?

A. Yes. We were just looking for him to see if he was going give us work or not.¹

Mr. Rivera further testified that he climbed the ladder to see if Mr. Alvarez was up on the roof. Mr. Rivera told claimant to wait but claimant started up the ladder which slipped and claimant fell. Mr. Rivera testified that Mr. Blanco was on the ground when the accident happened and that the three of them, Jesus, claimant and Mario, were not working on September 3, 2009, when claimant fell off the ladder.

Hector Martinez testified that he began doing roofing work for Mr. Alvarez in July 2009 and was paid \$100 a day for which he had to sign a receipt in order to receive his weekly compensation. Mr. Martinez testified that he knew all of the crew that worked for Mr. Alvarez and he did not know Mr. Blanco or the claimant. Mr. Martinez testified the claimant was not an employee of Mr. Alvarez and has never worked for Alvarez Roofing. Mr. Martinez testified that he heard claimant ask who the boss was but because he was working on the other side of the roof he did not witness the fall.

Scott Carpenter, field manager for Larry Walty Roofing, testified his job duties included oversight of all the crews that do subcontract work. Mr. Carpenter testified that Alvarez Roofing was a subcontractor from August to December 2009. Mr. Carpenter further testified that he would agree with whatever Mr. Alvarez's payroll records indicated regarding when people worked.

Mario Blanco testified that he worked for Alvarez Roofing from approximately July 2009 through September 18, 2009. He was paid in cash by Mr. Alvarez every Saturday based upon a pay rate of \$100 a day. Mr. Blanco said the crew that he worked with consisted of Jesus, Marcos, Juan, claimant and an individual called Guatemala. He further testified that he provided claimant and others transportation from Hutchinson to Wichita to work. Mr. Blanco testified that on the day of the accident claimant was on the roof working and had been sent to retrieve a metal piece and when he stepped on the ladder it slipped. Mr. Blanco testified claimant fell to the ground hitting his forehead on the pavement. Mr. Blanco and Jesus transported claimant to the hospital and Mr. Alvarez was called. But Mr. Blanco was not on the payroll records at Alvarez Roofing and as previously noted Mr. Alvarez denied that Mr. Blanco had ever worked for him.

Marvin Amador testified that he had worked for JP Pipeline until he was laid off in January 2010. Mr. Amador further testified that after he was laid off he worked for Mr. Alvarez for about a month and a half. And when he worked for Mr. Alvarez, Mr. Amador testified that claimant was also working for Mr. Alvarez. But payroll receipts showed Mr. Amador worked for JP Pipeline from September 14, 2009 to September 20, 2009, which was the week after the incident where claimant fell. And Mr. Amador testified that he was not working the day claimant fell and was injured.

¹ Rivera Depo. at 9.

The Special ALJ analyzed the evidence in the following fashion:

The claimant's version of the incident is inconsistent with the business records of Alvarez Roofing, LLC and the testimony of Giovanni Alvarez, Jesus Rivera and Hector Rivera. The Alvarez Roofing, LLC. payroll receipt book shows that each employee for each week paid signed the receipt book and Jose Moreno's name does not appear. The supervisor for Alvarez Roofing states that the Alvarez employees always tied off their ladders in compliance with OSHA standards and they have never been cited for a failure to do so. Claimant claimed that he worked seven days a week but the payroll records indicate that generally the crew worked five days a week. The Claimant's roommate testified that the claimant was looking for work on the day he fell rather than working.

The Special ALJ concluded claimant was not an employee working on the day of the incident and denied compensation. The Board agrees and finds claimant failed to meet his burden of proof that the relationship of employer/employee existed on the date of the accident and consequently he did not suffer accidental injury arising out of and in the course of employment.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Special Administrative Law Judge Seth Valerius dated August 13, 2010, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of March, 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Scott J. Mann, Attorney for Claimant
Roy T. Artman, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge
E.L. Lee Kinch, Board Member Pro Tem